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**FILED**  
01/25/2023  
Sara Calkins  
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Montana Water Court  
STATE OF MONTANA  
By: D'Ann CIGLER  
40E-0032-R-2022  
Ostrem, Eyvind  
8.00

IN THE WATER COURT OF THE STATE OF MONTANA  
LOWER MISSOURI DIVISION  
MISSOURI RIVER BASIN BETWEEN MUSSELSHELL RIVER  
AND FORT PECK DAM - BASIN (40E)  
PRELIMINARY DECREE

\*\*\*\*\*

CLAIMANTS: Kelly A. Koss; Sandra F. Koss; Mule Tracks  
Cattle Co.; Kelly Koss Testamentary Trust;  
**Montana State Board of Land  
Commissioners**

**CASE 40E-0032-R-2022**  
40E 164956-00  
40E 165702-00

OBJECTORS: Kevin A. Koss; Montana State Board of Land  
Commissioners

**NOTICE OF FILING OF MASTER'S REPORT**

This Master's Report was filed with the Montana Water Court on the above stamped date. Please review this report carefully.

You may file a written objection to this Master's Report within **10 days** of the stamped date if you disagree or find errors with the Master's findings of fact, conclusions of law, or recommendations. Rule 23, W.R.Adj.R. If the Master's Report was mailed to you, the Montana Rules of Civil Procedure allow an additional 3 days be added to the 10-day objection period. Rule 6(d), M.R.Civ.P. If you file an objection, you must serve a copy of the objection to all parties on the service list found at the end of the Master's Report. The original objection and a certificate of mailing to all parties on the service list must be filed with the Water Court.

If you do not file a timely objection, the Water Court will conclude that you agree with the content of this Master's Report.

## **MASTER'S REPORT**

Water right claims 40E 164956-00 and 40E 165702-00 appeared in the Preliminary Decree for the Missouri River Between Musselshell River and Fort Peck Dam (Basin 40E) issued October 7, 2020. Claim 40E 165702-00 received an objection from the State Board of Land Commissioners/TLMD (TLMD). Claim 40E 164956-00 received an issue remark from the DNRC during its review in preparation of the Preliminary Decree indicating potential legal or factual issues with the claim.

On August 2, 2022, the parties submitted a Stipulation signed by Kevin Koss, Sandra Koss, Kelly Koss Testamentary Trust (Kevin Koss), and TLMD (Aislinn Brown). The Stipulation seeks to resolve TLMD's objection to claim 40E 165702-00.

### **FINDINGS OF FACT**

#### **40E 164956-00**

1. Claim 40E 164956-00 is an irrigation claim to water from Telegraph Creek. It appeared in the preliminary Decree with a point of diversion in the SESWNW of Section 26, T24N, R31E. The DNRC placed the following issue remark on the claim during its review in preparation of the Preliminary Decree:

THE CLAIMED POINT OF DIVERSION IS IN QUESTION. THE LOCATION OF THE PUMP CANNOT BE IDENTIFIED FROM AVAILABLE DATA.

2. DNRC notes in the claim file suggest the legal land description of the pump in the SWNW of Section 26 is incorrect because Telegraph Creek does not flow through the SWNW of Section 26. Those notes suggest that the pump may instead be in the NWSW of Section 26.

3. The Water Court informed the Claimants that it is required to resolve the issue remark and on two occasions ordered the Claimants to provide information regarding the location of the pump. August 9, 2022 Order Setting Filing Deadline; October 21, 2022 Order to Show Cause. The Court informed the Claimants that if nothing was filed by the Show Cause deadline, the point of diversion would be corrected to the NWSW of Section 26. The Claimants have not filed anything or otherwise contacted the Court regarding this issue remark.

4. The following modification to claim 40E 164956-00 should be made to reflect the historical location of the pump:

**Point of Diversion and Means of Diversion:**

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1			<del>SE</del> SWNW <u>NWSW</u>	26	24N	31E	Phillips

40E 165702-00

5. Claim 40E 165702-00 is a stockwater claim to a reservoir on an unnamed tributary of Telegraph Creek.

6. TLMD objected to the ownership of the claim stating that Place of Use ID No. 2 (POU No. 2) is on School Trust land and TLMD should be added as a co-owner in accordance with *Department of State Lands v. Pettibone*, 216 Mont. 361, 702 P.2d 948 (1985).

7. The parties' Stipulation likewise requests that TLMD be a co-owner of the claim. In support, the Stipulation states that the State acquired school trust lands described in POU No. 2 on September 20, 1916. The priority date of the claim is December 31, 1948. There is no evidence in the claim or case files showing that the Claimants compensated the State for the ownership of POU No. 2.

PRINCIPLES OF LAW

1. The Montana Water Court has the authority to determine the extent of all water rights in the state as they existed prior to July 1, 1973. *Fellows v. Saylor*, 2016 MT 45, ¶ 25, 382 Mont. 298, 367 P.3d 732; §§ 85-2-233, -102(12), MCA.

2. Section 85-2-248(2), MCA requires the Water Court to resolve all issue remarks that are not resolved through the objection process. The Montana Water Court has the authority to resolve issue remarks when the claim file and information available to the Court provide a sufficient basis to do so. § 85-2-248(3), MCA.

3. If a claimant, objector, or intervenor fails to appear at a scheduled conference or hearing, or fails to comply with an order issued by the water court, the water court, upon motion, or its own initiative, may issue such orders of sanction with regard thereto as are just. Sanctions applied against claimants may include termination of the claim; or modification of the claim to conform with data provided by the department,

information obtained by the court, or information included in an objection. Rule 22, W.R.Adj.R.

2. The Water Court is not bound by settlement agreements, and all such agreements are subject to review and approval by the Court. Rule 17(a), W.R.Adj.R. Settlement agreements which seek to enlarge an element of a water right must be supported by sufficient evidence to meet the burden of proof applicable to that right. Rule 17(b), W.R.Adj.R. The burden of proof does not need to be met where changes proposed in a settlement agreement reduce or limit an element of a water right. Rule 17(c), W.R.Adj.R.

4. A lessee who makes an appropriation of water on school trust land does so on behalf of the State. Dep't of State Lands v. Pettibone, 216 Mont. 361, 368, 702 P.2d 948, 952 (1985). The title to a water right appropriated on school trust land vests in the State. Pettibone, 216 Mont. at 376, 702 P.2d at 957.

#### CONCLUSIONS OF LAW

1. The Claimants failed to participate meaningfully in the resolution of the point of diversion issue remark on claim 40E 164956-00. The point of diversion should be modified as described in Finding of Fact no. 4 above to conform with evidence before the Court. This modification resolves the point of diversion issue remark on the claim.

2. The parties established by a preponderance of the evidence that title to the land where Claim 40E 165702-00 POD ID No. 2 is located vested in the State as school trust land prior to the priority date of the claim. Therefore, TLMD should be added as a co-owner to claim the claim. This modification resolves TLMD's objection.

#### RECOMMENDATIONS

Based on the foregoing Findings of Fact and Conclusions of Law, this Master recommends the changes outlined above.

A post-decree abstract of each water right claim reflecting the recommended changes is attached to this Report.

**ELECTRONICALLY SIGNED AND DATED BELOW.**

**Service via Electronic Mail**

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Kelly Koss Testamentary Trust  
% Kevin Koss Trustee  
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10341 Larb Hills Rd  
Malta, MT 59538

**POST DECREE**  
**ABSTRACT OF WATER RIGHT CLAIM**  
**MISSOURI RIVER, BETWEEN MUSSELSHELL RIVER AND FORT PECK DAM**  
**BASIN 40E**

**Water Right Number:** 40E 164956-00 STATEMENT OF CLAIM  
**Version:** 5 -- POST DECREE  
**Status:** ACTIVE

**Owners:** SANDRA F KOSS  
2346 FOURCHETTE BAY RD  
MALTA, MT 59538  
  
KELLY A KOSS  
2346 FOURCHETTE BAY RD  
MALTA, MT 59538  
  
MULE TRACKS CATTLE CO  
10341 LARB HILLS RD  
MALTA, MT 59538

**Priority Date:** APRIL 1, 1968  
**Type of Historical Right:** USE  
**Purpose (use):** IRRIGATION  
**Irrigation Type:** FLOOD  
**Flow Rate:** 2.46 CFS  
**\*Volume:** THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.  
**Climatic Area:** 2 - MODERATELY HIGH  
**\*Maximum Acres:** 54.00  
**Source Name:** TELEGRAPH CREEK  
**Source Type:** SURFACE WATER  
**Point of Diversion and Means of Diversion:**

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>	
1		NWSW	26	24N	31E	PHILLIPS	
<b>*Period of Diversion:</b> MARCH 1 TO OCTOBER 31							
<b>Diversion Means:</b> PUMP							
<b>*Period of Use:</b> MARCH 1 TO OCTOBER 31							
<b>*Place of Use:</b>							
<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	36.00		NWNW	26	24N	31E	PHILLIPS
2	18.00		SWNW	26	24N	31E	PHILLIPS
<b>Total:</b>	54.00						

**Remarks:**

THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE SUPPLEMENTAL WHICH MEANS THE RIGHTS HAVE OVERLAPPING PLACES OF USE. THE RIGHTS CAN BE COMBINED TO IRRIGATE ONLY OVERLAPPING PARCELS. EACH RIGHT IS LIMITED TO THE FLOW RATE AND PLACE OF USE OF THAT INDIVIDUAL RIGHT. THE SUM TOTAL VOLUME OF THESE WATER RIGHTS SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

164956-00

165703-00

THIS APPROPRIATION OF WATER TAKES WATER FROM THE MISSOURI RIVER, BETWEEN MUSSELSHELL RIVER AND FORT PECK DAM DRAINAGE (BASIN 40E ) AND USES IT IN THE BEAVER CREEK, TRIBUTARY TO MILK RIVER DRAINAGE (BASIN 40M ). ANY OBJECTION TO THIS RIGHT MAY BE FILED DURING THE OBJECTION PERIODS FOR EITHER THE POINT OF DIVERSION OR PLACE OF USE BASIN.

**POST DECREE**  
**ABSTRACT OF WATER RIGHT CLAIM**  
**MISSOURI RIVER, BETWEEN MUSSELSHELL RIVER AND FORT PECK DAM**  
**BASIN 40E**

**Water Right Number:** 40E 165702-00 STATEMENT OF CLAIM

**Version:** 3 -- POST DECREE

**Status:** ACTIVE

**Owners:** MONTANA STATE BOARD OF LAND COMMISSIONERS  
TRUST LAND MANAGEMENT DIVISION  
PO BOX 201601  
HELENA, MT 59620 1601

SANDRA F KOSS  
2346 FOURCHETTE BAY RD  
MALTA, MT 59538

KOSS, KELLY TESTAMENTARY TRUST  
C/O KEVIN KOSS TRUSTEE  
10341 LARB HILLS RD  
MALTA, MT 59538 9524

**Priority Date:** DECEMBER 31, 1948

**Type of Historical Right:** USE

**Purpose (use):** STOCK

**Flow Rate:** A SPECIFIC FLOW RATE HAS NOT BEEN DECREED FOR THIS USE FROM THIS ONSTREAM RESERVOIR. THE FLOW RATE IS LIMITED TO THE MINIMUM AMOUNT HISTORICALLY NECESSARY TO SUSTAIN THIS PURPOSE.

**Volume:** THIS RIGHT INCLUDES THE AMOUNT OF WATER CONSUMPTIVELY USED FOR STOCK WATERING PURPOSES AT THE RATE OF 30 GALLONS PER DAY PER ANIMAL UNIT. ANIMAL UNITS SHALL BE BASED ON REASONABLE CARRYING CAPACITY AND HISTORICAL USE OF THE AREA SERVICED BY THIS WATER SOURCE.

**Source Name:** UNNAMED TRIBUTARY OF TELEGRAPH CREEK

**Source Type:** SURFACE WATER

**Point of Diversion and Means of Diversion:**

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		NESENE	35	24N	31E	PHILLIPS

**Period of Diversion:** JANUARY 1 TO DECEMBER 31

**Diversion Means:** DAM

**Reservoir:** ONSTREAM

<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
	NESENE	35	24N	31E	PHILLIPS

**Diversion to Reservoir:** DIVERSION # 1

**Period of Use:** JANUARY 1 TO DECEMBER 31

**Place of Use:**

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1			E2SENE	35	24N	31E	PHILLIPS
2			SWSWNW	36	24N	31E	PHILLIPS